

**CV 315.01 Personal injury: tort actions (claims arising on and after 4/7/05) [Rev. 8/6/14]****COMMENT**

Pursuant to S.B. 80, effective for claims that arise on and after 04/07/05, a "tort action" is defined as "a civil action for damages for injury or loss to person or property." R.C. 2315.18(B). A "tort action" includes a civil action for a "product liability claim" as defined in R.C. 2307.71 and an "asbestos claim" as defined in R.C. 2307.91. "Tort action" does not include (1) claims for breach of contract or agreements; (2) medical, dental, optometric, and chiropractic claims; (3) claims brought in the Ohio Court of Claims; (4) claims brought under R.C. Chapter 2744 against political subdivisions of Ohio; and (5) wrongful death actions brought under R.C. Chapter 2125.

R.C. 4513.263, effective 04/07/05, authorizes the trier of fact to diminish the recovery of compensatory damages that represent noneconomic loss as defined in R.C. 2307.011. In a tort action, such noneconomic damages that could have been recovered but for the plaintiff's failure to wear all of the available elements of a properly adjusted occupant restraining device may not be recoverable. In a jury case, the trial judge should give cautionary instructions at the time such evidence is admitted indicating that the evidence may not be considered in the determination of negligence or contributory negligence. The judge should give a modified compensatory damages instruction that the jury may diminish the recovery of noneconomic damages that would not have occurred if a restraining device had been in use.

1. **GENERAL.** If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (loss) proximately and directly caused by the (*describe applicable tortious conduct*) of the defendant.
2. **COMPENSATION.** In deciding this amount, you will consider the plaintiff's "economic loss" and "noneconomic loss," if any, proximately and directly caused by the plaintiff's actual (injury) (loss).
3. **ECONOMIC LOSS.** "Economic loss" means any of the following types of financial harm:
  - (A) all wages, salaries, or other compensation lost as a result of the plaintiff's (injury) (loss);
  - (B) all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of the plaintiff's (injury) (loss);
  - (C) all expenditures incurred by the plaintiff or by another person on behalf of the plaintiff to repair or replace the plaintiff's property that was injured or destroyed; and
  - (D) any other expenditure incurred as a result of the plaintiff's (injury) (loss) other than attorney's fees incurred by the plaintiff.

**COMMENT**

Drawn from R.C. 2315.18(A)(2) as enacted by S.B. 80, effective 04/07/05.

4. REASONABLE VALUE (ADDITIONAL). In deciding the reasonable value of medical, hospital, or other related care, treatment, services, products, or accommodations, you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to decide the reasonable value.

#### COMMENT

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

In *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, the Supreme Court of Ohio held that the enactment of R.C. 2315.20, effective 4/7/05, did not affect its prior ruling in *Robinson*.

5. INCOME TAXES. An award for (*describe type of damages*), if any, (is) (is not) subject to taxation under federal or state income tax laws. In no event may you add to or subtract from an award because of such taxes.

#### COMMENT

Some parts of an award to a claimant may be subject to federal and/or state income taxes. R.C. 2315.01(B) provides “[i]n all tort actions, the court shall instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is/is not subject to taxation under federal or state income tax laws.” The Committee believes that the trial judge should include instructions to comply with the statute when income tax issues are relevant to an award.

*Maus v. New York, Chicago & St. Louis Rd. Co.*, 165 Ohio St. 281 (1956), held that it was not error to reject a special instruction that required consideration of income taxes because such instruction encouraged the jury to “disregard the charge on the measure of damage.” Although *Norfolk & Western Ry. Co. v. Liepelt*, 440 U.S. 490, 100 S.Ct. 755 (1980), holds, as a matter of federal law, that the jury should be instructed in Federal Employer’s Liability Act (FELA) cases to consider the effect of taxes in awarding damages, *Kaiser v. Ohio Bell Telephone Company*, 8th Dist. Cuyahoga No. 43056 (Aug. 27, 1981), recognizes *Liepelt* as limited to FELA cases. Accordingly, the above instruction has no general application and should be used only as an instruction to disregard improper evidence or argument, or in response to a jury question. *Accord Terveer v. Baschnagel*, 3 Ohio App.3d 312 (1982).

6. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not

relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must resolve all issues presented to you only on the evidence admitted and the law in these instructions.

7. NONECONOMIC LOSS. "Noneconomic loss" means harm other than economic loss that results from the plaintiff's (injury) (loss), including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigurement; mental anguish; and any other intangible loss.

#### COMMENT

Drawn from R.C. 2315.18(A)(4) as enacted by S.B. 80, effective 04/07/05.

The Committee believes that the foregoing instructions abrogate the use of the permanent damages instruction found in *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601 (1992).

In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, the Supreme Court of Ohio upheld the constitutionality of "caps" on noneconomic damages as provided in S.B. 180.

8. FUTURE OR PERMANENT INJURY AND LOSS (ADDITIONAL). The plaintiff also claims that the injury or loss (is permanent) (will continue into the future). As to such claims(s), no compensation or damages may be found except that which is reasonably certain to exist as a (proximate) (direct) result of the (injury) (loss). In deciding the amount of permanent (injury) (loss), you should follow the definitions of economic loss and noneconomic loss that I have previously given to you. (If you decide to award compensatory damages for permanent [injury] [loss], you will further decide whether the [injury] [loss] involved

*(Use appropriate alternative)*

(A) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

*(or)*

(B) physical functional injury that permanently prevents the plaintiff from being able to

independently care for himself/herself and perform life-sustaining activities.

**COMMENT**

Drawn from R.C. 2315.18(B)(4) as enacted by S.B. 80, effective 04/07/05.

R.C. 2315.18 places a limit of \$250,000 on the amount of non-economic damages that may be recovered in a tort action. This limit may be exceeded only when the jury finds one of the two factors in (A) and (B) of the final sentence of paragraph 6 of this instruction, and the final sentence of paragraph 6 should only be given to the jury when the plaintiff seeks more than \$250,000 in non-economic damages. After the jury determines the amount of non-economic damages, judgment may be entered in an amount greater than \$250,000 only if the jury has found one of the two factors present; judgment may be entered in an amount of \$250,000 or less in non-economic damages without regard to the two factors in paragraph 6 of the instruction.

9. **CONSIDERATIONS IN DETERMINATION OF "NONECONOMIC LOSS".** In determining an award for "noneconomic loss," you shall not consider any of the following:

- (A) evidence of the defendant's alleged wrongdoing, misconduct, or guilt; and
- (B) evidence of the defendant's wealth or financial resources; and
- (C) all other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

**COMMENT**

Drawn from R.C. 2315.18(C) as enacted by S.B. 80, effective 04/07/05.

10. **CONSIDERATION OF THE PLAINTIFF'S BENEFITS.** During the trial of this case, the defendant introduced evidence of amounts payable as a benefit to the plaintiff for the damages that result from the plaintiff's claim for (injury) (loss). In response, the plaintiff introduced evidence of amounts that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits addressed by the defendant's offering of evidence. You may consider this evidence in arriving at a just verdict.

**COMMENT**

In R.C. 2315.20(A), effective 04/07/05, evidence of collateral benefits is admissible on the defendant's initiative in "any tort action," which, with regard to this statute, the benefit applies to "claims

for damages due to injury, death, or loss to person or property," including product liability claims and asbestos claims, and not including medical, dental, optometric, or chiropractic claims and not including claims for breach of contract or agreement. Such evidence of collateral benefits is inadmissible "if the source of the collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment... however, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action." R.C. 2315.20(A).

S.B. 80 further provides that "[a] source of collateral benefits of which evidence is introduced [by the defendant as described above] shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant." R.C. 2315.20(C). The Committee believes that this instruction is not intended to defeat a right of subrogation if the defendant introduces evidence of a benefit for which a subrogee has a contractual or statutory interest; rather, the Committee believes the intent of R.C. 2315.20(C) to declare that nonsubrogated interests are subject to admissibility under R.C. 2315.20(A).

Because the statutory language of S.B. 80 concerning the admissibility of evidence of a "collateral benefit" does not specify how the trier of fact is to consider the evidence, the Committee believes it is unclear whether the "collateral benefits rule" as described in *Pryor v. Webber*, 23 Ohio St.2d 104 (1970), has been abrogated.

11. **SPECULATION.** Regarding (permanent) (future) damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In deciding (permanent) (future) damages, you may consider only those things that you find from the evidence are reasonably certain to continue.

12. **REASONABLY CERTAIN.** "Reasonably certain" means probable, that is, more likely to occur than not.

#### **COMMENT**

Drawn from *State v. Holt*, 17 Ohio St.2d 81 (1969).

13. **VERDICTS.** If you find by the greater weight of the evidence that the plaintiff is entitled to recover, you will sign the general verdict form in favor of the plaintiff, and you will continue your deliberations and answer written questions called interrogatories about the plaintiff's damages.

14. **NUMBER OF JURORS TO REACH DECISIONS.** It is necessary that at least (six) (three-fourths) of the jurors agree on the answers to the interrogatories and on the general verdict. Those of you who agree will sign in ink the answers to the interrogatories and the general verdict.

15. INTERROGATORIES.

(A) The total compensatory damages recoverable by the plaintiff.

STATE YOUR ANSWER IN FIGURES IN INK. \$ \_\_\_\_\_

_____	_____
_____	_____
_____	_____
_____	_____

(B) The portion of total compensatory damages that represents damages for economic loss.

STATE YOUR ANSWER IN FIGURES IN INK. \$ \_\_\_\_\_

_____	_____
_____	_____
_____	_____
_____	_____

(C) The portion of total compensatory damages that represents damages for noneconomic loss.

STATE YOUR ANSWER IN FIGURES IN INK. \$ \_\_\_\_\_

_____	_____
_____	_____
_____	_____
_____	_____

(D) Do you find that the plaintiff sustained

(1) (permanent and substantial physical deformity) (loss of use of a limb) (loss of a bodily organ

system)?

Yes \_\_\_\_\_ No \_\_\_\_\_

CHECK YOUR ANSWER IN INK.

_____	_____
_____	_____
_____	_____
_____	_____

(2) permanent physical functional injury that permanently prevents the plaintiff from being able to independently care for himself/herself and perform life-sustaining activities?

Yes \_\_\_\_\_ No \_\_\_\_\_

CHECK YOUR ANSWER IN INK.

_____	_____
_____	_____
_____	_____
_____	_____

16. GENERAL VERDICT. OJI-CV 403.01 § 4.